No. 05-593

Supreme Court, U.S.
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In The Supreme Court of the United States

PAT OSBORN,

Petitioner,

v.

BARRY HALEY, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS, GAYE VERDI f/k/a GAYE LUBER AND LAND BETWEEN THE LAKES ASSOCIATION, INC.

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QUESTIONS PRESENTED

1. Whether a federal employee is entitled to have the district court determine the truth of the plaintiff's controverted allegations before denying immunity to the employee based solely on the nature of the conduct or tort alleged, once the Attorney General has certified that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679(d).

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. § 2679(d)(2), means that a district court must retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification and declines to substitute the United States as the defendant.

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is under review are Pat Osborn, Barry Haley, Gaye Verdi, f/k/a as Gaye Luber (hereinafter "Verdi"), and Land Between the Lakes Association, Inc. (hereinafter "LBLA").

Pursuant to Sup. Ct. R. 29.6, Respondent Land Between the Lakes Association, Inc., states that it is not the subsidiary of any other corporate entity, and no publicly held corporation owns more than ten percent (10%) of its stock.

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STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, 28 U.S.C. § 2679(d), the full text of which appears as App. A hereto; the general remand statute, 28 U.S.C. § 1447, attached as App. B hereto; and the federal officer removal statute, 28 U.S.C. § 1442, attached as App. C. 28 C.F.R. §§ 15.3 and 15.4 are also referenced herein and attached as App. D.

STATEMENT OF THE CASE

Petitioner Osborn contends Respondent LBLA terminated her employment because she filed an inquiry with the United States Department of Labor to determine whether a separate entity, the nearby U.S. Forest Service office, had considered her "veterans' preference points" before rejecting her application for federal employment. (Compl., App. A to Verdi's Br. in Opp'n 1-5.) Osborn sued LBLA and its Executive Director, Respondent Verdi, in state court for common law wrongful discharge and related torts, and sued Respondent Haley, the Forest Service's Business Manager, for interfering with Osborn's employment relationship with LBLA. (*Id.* 1-15.) Petitioner asserts that the United States, after removing the case to federal court, conceded that its employee Barry Haley's alleged conduct was outside the scope of his federal employment, so that the only question in dispute was whether these allegations were true. This seriously misconstrues the district court record as it applies to the issues before this Court.

The United States' Notice of Removal pointed out that Osborn alleged: (1) that she was a Volunteer Coordinator employed by LBLA, a contractor to the U.S. Forest Service; (2) that she was terminated for "not being a good Forest Service partner;" and (3) that Haley was employed as Business Manager for the Forest Service "at all times relevant" to her complaint. (Notice of Removal, R. 1; *see* Compl., App. A to Verdi's Br. in Opp'n 2, 4.) The Acting U.S. Attorney (by her authority delegated from the Attorney General under the Westfall Act)[1] had certified that the named federal defendant was acting within the scope of employment at the time of the alleged conduct. (Certification, App. C to Verdi's Br. in Opp'n 23.) Accordingly, the United States asserted the defense of immunity on Haley's behalf and requested removal to federal court under the federal officer removal statute, 28 U.S.C. § 1442, as well as the Westfall Act, 28 U.S.C. § 2679. (Notice of Removal, R. 1.)

In its Answer, the United States specifically denied the allegations that Haley acted outside the scope of his employment. (*Compare* Compl. ¶¶ 29, 34, 41, App. A to Verdi's Br. in Opp'n 7, 8, 10, *with* U.S.'s Answer ¶¶ 14 (denying ¶ 29 of the Complaint), 16 (denying ¶ 34 of the Complaint), 19 (denying ¶ 41 of the Complaint), App. B to Verdi's Br. in Opp'n 18-19.) The U.S. Attorney's Certification contained no further explanation and no concession that Haley's alleged actions would have been outside the

[1] Congress authorized the Attorney General to make such certifications. 28 U.S.C. §§ 2679(d)(1) and (2). The Attorney General has delegated this authority by regulation to United States Attorneys, who make certification decisions in consultation with the Department of Justice. *See* 28 C.F.R. §§ 15.3, 15.4 (2005).

scope of his employment even if they had occurred. (Certification, App. C to Verdi's Br. in Opp'n 23.) The United States then filed a Notice of Proposed Substitution seeking to substitute the Government as defendant (Notice of Proposed Substitution, R. 11), and moved to dismiss Osborn's Complaint, citing her need to exhaust administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, before proceeding against the United States. (*See* U.S.'s Mot. to Dismiss, App. D to Verdi's Br. in Opp'n 24-29.) Like the United States' Answer, the Motion contains no concession that Haley's alleged acts would have been outside the scope of his employment if they occurred. (*See id.*)

Osborn responded to the Motion by arguing that the following alleged facts demonstrated Haley acted outside the scope of his employment: (1) the Complaint alleges that Haley "induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff of her job . . . "; (2) a Memorandum of Understanding between the U.S. Forest Service and the LBLA stated that Forest Service employees would not participate in any LBLA decision concerning "hiring or firing" LBLA employees; and (3) Robert Kuenzli, a Department of Labor investigator, stated in a letter that Petitioner was fired because Kuenzli called Haley. (*See* Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 17-20.) However, in addition to presenting double hearsay, the same letter described a meeting wherein Osborn drew a "big laugh" by criticizing Haley in the workplace in front of nearly 80 people, resulting in her boss's request that she apologize to Haley; all before Kuenzli ever contacted Haley. (Ex. C to Pl.'s Resp. to U.S.'s Mot. to Dismiss, App. E to Verdi's Br. in Opp'n 30-33.) The letter also stated that Osborn told Kuenzli that her boss, Tamara

Newkum, said that Haley had demanded she terminate Osborn for insubordination. (*Id.*) Further, when Kuenzli asked Osborn what caused the insubordination, "she explained that it was the comment she made at the staff meeting to Mr. Haley." (*Id.*) Thus, Kuenzli's own account indicates Osborn's termination resulted from the comment made at the staff meeting – before Kuenzli's phone call – and that Osborn understood this.

In reply, the United States pointed out that the Petitioner never alleged any facts showing that Haley acted outside the scope of his employment; rather, the Complaint (at ¶ 6) stated that Haley was "employed by the Forest Service at all times related to the complaint." (U.S.'s Reply to Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 35, 37.) The allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff" were merely conclusory, the Government argued, and presented no facts supporting the contention that Haley acted outside the scope of his employment; i.e., there were no specific allegations that Haley even attempted to affect Osborn's employment. (*Id.*, J.A. 38.) Nowhere in its Reply did the Government concede that Haley's alleged acts were outside the scope of his employment if they occurred. Instead, the Reply merely pointed out that the Petitioner failed to meet her burden of proving Haley acted outside his federal employment. (*Id.*, J.A. 36.)[2]

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[2] The courts of appeal agree this burden shifts to the plaintiff upon certification by the Attorney General. (*See* U.S.'s Reply, J.A. 36 (citing *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 685 (1st Cir. 1999); *Taboas v. Mlynczak*, 149 F.3d 576, 581 (7th Cir.

(Continued on following page)

When the district court then issued its Memorandum and Order overruling the Certification, the court mistakenly concluded that

> the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times.

(D. Ct. Mem. & Order, App. D to Pet. Cert. 22a.) To be precise, the United States could not literally have denied such a specific factual allegation, because Osborn never made it. As set forth above, however, the United States did point out the absence of such, and specifically denied Osborn's conclusory allegation that Haley induced her termination – in addition to denying that Haley acted outside the scope of his employment.

The district court apparently recognized that a plaintiff cannot defeat a motion to dismiss after the United States substitutes itself as a defendant merely by relying upon the factual allegations in his complaint. (*Id.*, App. D 21a-22a (citing *Gilbar v. United States*, 108 F. Supp. 2d 812, 816-17 (S.D. Ohio 1999), *aff'd*, 229 F.3d 1151 (unpublished table opinion), 2000 WL 1206538 (6th Cir. 2000)).)

1998); *Palmer v. Flaggman*, 93 F.3d 196, 198 (5th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994)).)

Nonetheless, the district court concluded that no evidentiary hearing was needed because there was no conflicting evidence as to a material fact, noting that "Ms. Osborn need not provide additional proof of an undisputed fact absent any challenge to those facts by the United States." (*Id.*, App. D 22a, 23a n.2.) The court then ruled the alleged conduct, if it occurred, was outside the scope of Haley's employment under Kentucky law, in part because "there is no indication – or even argument – that any of Mr. Haley's actions, if proven, furthered the Forest Services' goals." (*Id.*, App. D 23a.) The court accordingly overruled the Attorney General's "declaration of substitution and/or certification," resubstituted Haley as a defendant,[3] and remanded the case to state court. (*Id.*, App. D 24a, 25a; D. Ct. Order, App. C to Pet. Cert. 17a.)

Contrary to her present argument that remand following such a ruling was required, Osborn had not requested remand in opposing the United States' Motion. Instead, she asked the court to lift the stay on discovery so that the case could move forward against Haley in federal court. (Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 20; Tendered Order attached to Pl.'s Resp., R. 15.)

In its Motion to Reconsider, the United States reminded the court that it had indeed vigorously contested Petitioner's allegations, and further attached Declarations from the individual defendants stating that they had never discussed Osborn's "veterans' preference" inquiry.

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[3] The court did not designate its action as "resubstitution," but this was its practical effect given the automatic substitution of the United States following certification. *See* 28 U.S.C. § 2679(d)(2) (directing that the United States "shall be substituted as the party defendant" upon certification).

(U.S.'s Mot. to Recons., J.A. 40-45, 51-54.) Thus, the United States was compelled to supplement the record with specific, sworn statements refuting allegations that the Petitioner had never specifically made. At the same time, assuming "for the sake of argument only" that Haley and Verdi "interacted regarding plaintiff's employment," the United States argued that Haley's alleged conduct in causing Osborn's firing could be construed as furthering his employer's goal of "partnering with competent contract employees in a healthy and productive work environment. . . . " (*Id.*, J.A. 47.)

In responding to the United States' Motion to Reconsider, Osborn merely repeated her allegations that (1) Verdi met with her to discuss problems with her employment on the same day that Haley learned she had filed a complaint with the Department of Labor, and (2) she was terminated by Verdi two days later. (Pl.'s Resp. to U.S.'s Mot. to Recons., R. 23.) Again, she failed to allege any contacts between Haley and Verdi regarding her employment.

Finally, in its order denying the United States' Motion to Reconsider, the district court accepted that it is "highly unlikely," in light of Haley's affidavit, that Osborn could develop proof demonstrating that Haley "interacted with Verdi regarding Osborn's employment." (D. Ct. Order, App. B to Pet. Cert. 14a.) Nevertheless, the district court further explained that it could neither decide the basic question of whether the communication occurred at all, nor consider the United States' alternative legal argument that inducing Osborn's termination could have benefitted Haley's employer and been within the scope of his employment, as this would contradict Haley's declaration under oath. (*Id.*, App. D 14a-15a.)

Thus, having previously overruled the Certification without a hearing because the United States had supposedly failed to deny the underlying "allegations," the district court later held that it must sustain its ruling without a hearing because it could not consider the United States' proof refuting the underlying "allegations." Further, the district court simply declined to consider the alternative legal argument that a Forest Service representative could conceivably act within the scope of his employment in attempting to influence a contractor to provide cooperative employees. Inherent in this rationale is the court's conclusion that Haley's involvement in Osborn's termination for any reason, whether related to the Department of Labor inquiry or otherwise, would have necessarily been outside the scope of his employment as a matter of law.

In summary, the United States never conceded that Petitioner's conclusory allegations, or her implied but never-stated underlying factual allegations, described conduct outside the scope of Barry Haley's employment. This is not the "simple and stark" case Petitioner suggests, as when the parties agree that the defendant/employee's alleged conduct was necessarily outside the scope of his employment under any version of the facts which could be presented. Rather, this is a case in which the federal employee has been denied immunity even though matters relevant to both the characterization of his alleged conduct and whether it occurred at all have not yet been fully heard.

SUMMARY OF ARGUMENT

The Westfall Act provides, without qualification, that the Attorney General's certification shall "conclusively" establish scope of office or employment for purposes of removal only. The Court should give effect to this plain declaration, and thereby reconcile all legal principles and authorities pertinent to this dispute. Congress has effectively foreclosed judicial review of removal jurisdiction, while allowing judicial review of the question of scope of employment – i.e. immunity – as determined by *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). This approach satisfies the Constitution because the distinctly federal question of immunity is present in these cases from the outset, even when the underlying facts are in dispute.

Question 1:

Petitioner contends the Attorney General had no authority under the Westfall Act to deny her factual allegations but simultaneously certify that Respondent Haley acted within the scope of his employment. The Attorney General's authority, however, is unrestricted by the statute. The relevant question is not the scope of the Attorney General's authority to issue a certification, but the proper scope of judicial review of that certification when the underlying facts are in dispute. Petitioner asks the Court to preclude judicial review in such cases, automatically denying immunity even to federal employees who are falsely accused, based solely on the nature of the conduct alleged. The purpose and language of the Westfall Act prohibit this approach. Under the statutory scheme, once the Attorney General certified Respondent Haley was acting within the scope of his federal employment, Haley

was entitled to have the district court determine the truth of the plaintiff's controverted allegations before deciding his immunity.

Congress made no exception in the Westfall Act for so-called "incident-denying" certifications, and the Court should not create one. The legislative history shows Congress intended to restore, to federal employees who acted within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the holding in *Westfall v. Erwin*, 484 U.S. 292 (1988). To preclude removal, certification and substitution for falsely-accused employees would automatically deny them judicial review of the scope of employment question due solely to the wording of the complaint – even though they necessarily acted within the scope of their employment at all times. Yet the same exception would guarantee judicial review only for those employees who actually committed the alleged conduct and may therefore have acted beyond the scope of their employment.

Lamagno held that judicial review is indispensable before a final determination of immunity. This should be no less true for defendants than it is for plaintiffs; otherwise, the plaintiff, rather than the district court, will become "sole judge in her own cause." *Lamagno* itself involved an "incident-denying" certification, and the opinion recognizes that judicial review will include determinations of fact. Such determinations are distinct from resolving the merits. They are nonetheless prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope

of his employment without first determining what he actually did at the time of the incident alleged.

If the government employee must try the case to disprove facts relevant to scope of employment, as Petitioner advocates, then his immunity has already been lost. This reality distinguishes Westfall Act cases from qualified immunity cases, in which the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff claims a violation of "clearly established law." This Court's pre-*Westfall* holdings allowed government employee defendants to deny the allegations and challenge the lack of supporting evidence relevant to immunity through summary judgment motions. Since Congress sought to restore federal employees' immunity to its pre-*Westfall* status, it is not reasonable to interpret the Westfall Act as destroying the employees' right to put plaintiffs to their proof.

Section 2679(d)(3) has been interpreted to allow judicial determination of the underlying facts during review of the Attorney General's refusal to certify. Logically, when the Attorney General has certified that a federal employee was acting within the scope of his employment, the employee should be entitled to the same factual review before having the certification overturned and his immunity revoked.

The "scope of employment" analysis under § 2679(d) is also analogous to the "color of office" inquiry under the federal officer removal statute, which allows removal if the officer's relationship to the plaintiff derived from his official duties; the officer need not admit the plaintiff's allegations in order to establish federal jurisdiction.

Petitioner's own court filings establish such a relationship with Respondent Haley.

As illustrated by the district court proceedings in this case, the "incident denial" exception Petitioner asks the Court to read into the statute would also deny falsely-accused federal employees their right under the Civil Rules to deny the allegations but plead in the alternative that a complaint describes conduct which, even if it were true, falls within the scope of employment. By contrast, interpreting the statute as written will impose no "burden" on plaintiffs, other than having to accept a federal judicial determination of the federal issue of the scope of a federal worker's employment – just as they do when an employee has challenged the Attorney General's refusal to certify.

Question 2:

Congress made the Attorney General's certification "conclusive" only for purposes of removal, while remaining silent as to judicial review of the question of scope of employment. Congress thus declared its intent to foreclose remand of such cases under any circumstances, even if the proceedings ultimately establish the federal defendant acted beyond the scope of employment. By contrast, Congress specifically required remand for "beyond the scope" cases removed without the Attorney General's certification. By omitting this requirement for Attorney General-certified removals, Congress made clear that such cases are to remain in federal court.

This Court has already determined, in the context of the federal officer removal statute, that the Constitution allows Congress to provide a federal forum for claims against federal employees, if the employee raises the

federal defense of immunity from the outset. Federal defendant Haley did so here, removing the case pursuant to both the officer removal statute and the Westfall Act. Accordingly, he was entitled to the federal forum Congress provided to him, consistent with Article III. The *Lamagno* plurality correctly concluded that Congress acted in accordance with Article III in prohibiting remand following the Attorney General's certification, as the significant federal question of immunity is present from the outset in such cases. Petitioner's attempt to portray the certification and removal of this case as somehow "unauthorized" has no support in the statute or the record. Even if the certification had been based solely on denial of the facts asserted by Petitioner, the Attorney General would still have been certifying that Haley acted within the scope of his employment – meaning the purely federal question of Haley's immunity would still have been present from the outset.

Question 3:

The court of appeals had jurisdiction to review this matter. The order resubstituting Haley as a defendant was immediately appealable under the collateral order doctrine as a conclusive denial of governmental immunity, an important issue separate from the merits and effectively unreviewable on appeal from a final judgment. The resubstitution order was also reviewable under *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140 (1934), as it logically preceded and could be "disaggregated" from the order remanding the case to state court. Unlike in *Kircher v. Putnam Funds Trust*, 547 U.S. ___, 126 S. Ct. 2145 (2006), in which the district court's order of dismissal pursuant to the Securities Litigation Uniform Standards Act resolved

all claims, here state law claims against Haley and these Respondents remain to be tried.

The remand order is reviewable as well under the exception to 28 U.S.C. § 1447(d) explained in *Thermtron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). This provision protects from appellate review only those remand orders invoking the grounds specified in § 1447(c); i.e., that removal was "improvident and without jurisdiction." A district court cannot remand a properly removed case on grounds it has no authority to consider. Here, unlike in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) and *Kircher*, Congress had foreclosed any issue of removal jurisdiction through its "clear statutory command" that the Attorney General's certification would be conclusive for purposes of removal. Respondents' appeal was not a challenge to a district court's mere legal error in denying jurisdiction. Instead, Respondents maintain the district court lacked statutory authority to question its jurisdiction or to remand at all following certification. Allowing the district court to override Congress' statutory directive with impunity would effectively void § 2679(b)(2). Enforcing this provision would not weaken § 1447(d), which never comes into play when Congress has specifically acted to foreclose any jurisdictional disputes. Denying effect to the statute would also threaten the underpinnings of *Lamagno*; while enforcing it will reconcile the Court's prior holdings with the issues now at hand.

Petitioner's three arguments depend ultimately on the same two premises: (1) the Attorney General's certification in this case was based solely on denial of the underlying allegations; and (2) the scope of employment issue, and therefore the question of immunity, is never reached when the certification merely denies the allegations. For the

reasons stated herein, each premise is false. This is not merely an "incident-denying" case. Rather, this case involves the need for the district court to determine facts and hear legal arguments relative to the truth, characterization and effect of the defendant/federal employee's alleged conduct under Kentucky law defining scope of employment. Even if nothing were left to decide but the truth of the allegations, the court's ruling would still determine whether Haley is entitled to immunity, a federal question which has been present from the outset. For these reasons, the certification was authorized, the statutory prohibition of remand following certification is constitutional, and the district court acted beyond its authority in remanding the case to the state court, rendering its order subject to appellate review. This Court should exercise its jurisdiction to review the issues raised by Petitioner, and uphold Congress' constitutional power to provide a federal forum for claims against all federal officers and employees – including those who may be falsely accused.

ARGUMENT

I. The District Court Should Have Determined the Truth of the Plaintiff's Controverted Allegations Before Deciding Haley's Immunity.

A. Congress made no exception to the Westfall Act for so-called "incident-denying" certifications.

Under 28 U.S.C. § 2679(d)(2), the Attorney General may certify that the defendant employee was acting within the scope of his office or employment "at the time of the incident" from which the claim arose, upon which the

action shall be removed, or he may choose not to so certify. Congress imposed no qualification or restriction whatsoever on the Attorney General's authority to admit, deny, or consider the facts underlying the plaintiff's allegations in reaching this certification decision. Had it intended to do so, Congress might have used a phrase such as "when committing the conduct" instead of "at the time of the incident," as the latter wording leaves open the possibility that the employee may have been "on the job" when an incident occurred without participating in the specific conduct alleged. So long as the federal employee is acting in the course and scope of employment "at the time of the incident" – whether as described by the plaintiff or otherwise – the Attorney General may issue the Westfall Act certification.

To support her separate argument that federal jurisdiction was never present, Petitioner nevertheless misconstrues Congress' choice not to specifically authorize a so-called "incident-denying" certification as a limitation on the Attorney General's authority to certify. In fact, as illustrated above, the absence of an express limitation means exactly that. By mandating removal without qualification when the certification is in the employee's favor, Congress necessarily contemplated that the Attorney General would exercise judgment in making a certification in each case.

However, as the Court concluded in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), this does not mean that the Attorney General's certification, once made, is conclusive, except for purposes of removal as specifically stated in § 2679(d)(2). Thus, Congress left the accuracy of the certification – i.e. the question of the defendant's immunity from suit – open for judicial review. *Id.* As the

Sixth Circuit concluded, it is the scope of this judicial review, and specifically the district court's freedom to resolve factual disputes before denying immunity to the federal employee, which is properly at issue – not the Attorney General's authority to make the certification and remove the case to federal court. (*See* 6th Cir. Opinion, App. A to Pet. Cert. 4a, *available at Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006).) Under Petitioner's approach, there in effect would be no judicial review for falsely-accused federal employees, because the district court's inquiry would stop upon the defendant's denial of the plaintiff's allegations.

B. Interpreting the Act to exclude the underlying facts from judicial review would unfairly deny immunity to falsely-accused federal employees.

Petitioner contends that district courts should simply assume the truth of the plaintiff's underlying allegations in all cases, and deny immunity to the defendant if the nature of the alleged acts is such that they would necessarily fall outside the scope of employment if they occurred. This argument overlooks the point that a defendant who did not commit the alleged "beyond the scope" conduct was necessarily acting "within the scope" of his employment at the time of the incident. It follows that under Petitioner's approach, a falsely-accused defendant who was entitled to immunity would not get immunity. He would still be entitled to defend the underlying claims, and of course would avoid liability if successful, but only at his own considerable expense. This is not immunity. Literally, it is denial of immunity without judicial review. Accordingly, it

would defeat the purpose and express provisions of the Westfall Act.

The legislative history shows Congress intended to restore, to federal employees who act within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the *Westfall* holding. *See* H.R. Rep. No. 100-700 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947. The exception Petitioner seeks would undo this remedy and discriminate unfairly against federal employees falsely accused of any type of conduct or tort. Yet the same exception would illogically guarantee judicial review for those who actually committed the alleged conduct, and may therefore have acted beyond the scope of their employment. By contrast, interpreting the statute as written will impose no "burden" on plaintiffs, other than having to accept a federal judicial determination (now available to them pursuant to *Lamagno*) of the federal issue of the scope of a federal worker's employment, and try their underlying claims in federal court.

C. *Lamagno's* reasoning that judicial review is indispensable before a final determination of the immunity question should apply equally to defendants and plaintiffs.

Precluding removal, certification, and substitution for falsely-accused employees, as Petitioner advocates, would automatically deny them immunity without judicial review. In *Lamagno*, this Court essentially found that to protect the plaintiff, judicial review was indispensable before a final and binding determination granting immunity to the federal employee: "Thus, absent judicial review

and court rejection of the certification, Lamagno would be released from the litigation. . . ." *Lamagno*, 515 U.S. at 422. The determination is no less final and binding for the falsely-accused employee, and judicial review is therefore no more dispensable. In *Lamagno,* this Court declined to cast district court judges into the role of "petty functionaries," by insulating the Attorney General's certification from review and making her delegate "sole judge" with regard to the employee's immunity. *See id.* at 426, 429. Petitioner's approach would cast the hypothetical plaintiff, instead of the Attorney General, as "sole judge" in her own cause, by allowing her to decide immunity unilaterally through false accusations of torts that are by definition beyond the scope of employment, while requiring the district judge to act as a "petty functionary" in remanding such claims without first assessing the facts.

As Petitioner recognized, scope of employment "sets the line" according to *Lamagno*:

> If Lamagno is inside that line, he is not subject to petitioners' suit; if he is outside the line, he is personally answerable. The sole question, then, is *who decides* on which side of the line the case falls: the local United States Attorney, unreviewably or, when that official's decision is contested, the court.

Id. at 423-24. Applying this rationale here, it is irrelevant whether the defendant or the Attorney General denied the plaintiff's allegations. What matters is whether Barry Haley acted within the scope of his employment and who will decide whether he did so. This decision literally cannot be made without deciding the relevant facts, since they are in dispute. The Court in *Lamagno* declined to transfer the final scope of employment determination from

the district court to the United States Attorney as an interested party, absent an express directive from Congress to do so. By the same logic, it should not transfer the final determination to the plaintiff, who could then control the result through false allegations and/or artful pleading.

D. The Court's prior holdings suggest that judicial review in immunity cases may include factual determinations.

The Court inherently recognized in *Lamagno* that the district courts' review of certifications will include factual determinations: "In adjudicating the scope-of-federal-employment question 'at the very outset,' the court inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee." *Lamagno,* 515 U.S. at 435; *see also id.* at 442 (Souter, J., dissenting) ("[L]itigating the question whether an employee's allegedly tortious acts fall within the scope of employment will, of course, always require some evidence to show what the acts were."). "Second, when a Government official's determination of a fact or circumstance – for example, 'scope of employment' – is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable." *Id.* at 424. "The key question presented – scope of employment – however contestable in fact, would receive no judicial audience [under the defendant's interpretation]." *Id.* at 429.

Indeed, *Lamagno* involved an "incident-denying certification" revealed through the "crucible of litigation," as defined by Petitioner. (*See* Petr.'s Br. 19 n.5.) The scope of employment question before the Court involved allegations that the federal defendant, Lamagno, was intoxicated while driving, and that his passenger, an unidentified woman,

was not a federal employee. *Lamagno*, 515 U.S. at 420-21. The Fourth Circuit's more detailed description, on appeal following remand, confirms these allegations were in dispute. *See Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1156-1159 (4th Cir. 1997), *cert. denied*, 522 U.S. 931 (1997). Lamagno's brief as Respondent also indicates that the Government had denied many of the Petitioner's allegations. *See* Brief For Respondent Dirk A. Lamagno at 2-3, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) (No. 94-167), 1995 WL 39033, at *6-7. In requiring judicial review of such an "incident-denying" certification, the Court must have contemplated that the district court's inquiry would include resolving factual determinations pertinent to the scope of Lamagno's employment.

Petitioner correctly contends that determining immunity is distinct from resolving the merits of the case. This does not mean that determining immunity cannot include determination of facts relevant to immunity. Factual determinations are prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope of his employment without first determining what the defendant actually did. If the employee must try the case to disprove facts relevant to scope of employment as Petitioner advocates, then his immunity has already been lost.

In the qualified immunity cases upon which Petitioner so heavily relies, the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff has claimed a violation of "clearly established law." Certainly, both absolute and qualified immunity cases ultimately involve questions of

law that must be decided before trial. Orders denying both are effectively unreviewable on appeal from a final judgment, because immunity is "effectively lost if a case is erroneously permitted to go to trial," and orders denying both are therefore appealable before final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985); *see also infra* Part III(A)(1) (discussing collateral order doctrine). But this does not alter the fact that the court must consider the plaintiff's factual allegations in resolving the immunity issue. *Mitchell*, 472 U.S. at 529. In so doing, prior to *Westfall v. Erwin*, 484 U.S. 292 (1988), the district courts would grant summary judgment on grounds of immunity if the plaintiff could tender no competent evidence of conduct beyond the scope of the immunity; the fact that the defendant needed to contest the plaintiff's merits allegations to establish his immunity did not preclude summary judgment in his favor. *Melo v. Hafer*, 13 F.3d 736, 744-745 (3d Cir. 1994) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987)). "If the defendant did not qualify for immunity on the facts alleged in the complaint, however, this did not mean the defendant had to go to trial." *Id.* at 745. Since Congress specifically sought to restore the early resolution of immunity which had been available before *Westfall*, it is not reasonable to suggest that Congress intended for the Westfall Act to destroy the federal employee's opportunity to deny the plaintiff's allegations relevant to immunity, and challenge the lack of supporting evidence thereof. *See id.* at 744 (citing H.R. No. 100-700 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946). Even in qualified immunity cases in which the complaint adequately alleges acts that violate clearly established law, the defendant is entitled to summary judgment if discovery fails to create a genuine issue of fact regarding the alleged conduct.

Mitchell, 472 U.S. at 526. This is necessary to protect the defendant's "entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability. . . . " *Id.* Nothing in the line of qualified immunity cases Petitioner cites supports her argument that defendants who deny the allegations in the complaint automatically forfeit their immunity.

E. Section 2679(d)(3) allows judicial determination of the underlying facts when the Attorney General has refused to certify the employee was within the scope of employment, and it would be illogical to omit such determination when the Attorney General has so certified.

The four circuits that directly rejected the approach of *Wood v. United States*, 995 F.2d 1122 (1st. Cir. 1993) (en banc) (Breyer, J.) compared § 2679(d)(2) with § 2679(d)(3), which does not contain the "time of the incident" clause upon which the First Circuit relied. *See* 6th Cir. Opinion, App. A to Pet. Cert. 6a-7a, *available at Osborn v. Haley*, 422 F.3d 359, 363-64 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006); *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996); *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1995), *cert. denied,* 515 U.S. 1145 (1995); *Melo v. Hafer*, 13 F.3d 736, 746-47 (3d Cir. 1994). Section 2679(d)(3) merely requires the district court, when petitioned by the employee following the Attorney General's refusal to certify, to "find and certify [prior to substitution] that the employee was acting within the scope of his office

or employment." These courts pointed out that it is unlikely that Congress intended the Attorney General, in deciding whether to certify pursuant to (d)(2), to be more circumscribed by the plaintiff's allegations than the district court, in deciding whether to certify pursuant to (d)(3). *See id.* Petitioner does not contend that § 2679(d)(3) excludes the underlying facts from judicial review, and Respondents can find no case that so holds. The First and Ninth Circuits have recognized that the district court's role in reviewing challenges to the Attorney General's refusal to certify, brought pursuant to § 2679(d)(3), includes fact finding. *See Lyons v. Brown,* 158 F.3d 605 (1st Cir. 1998); *Green v. Hall,* 8 F.3d 695 (9th Cir. 1993) (per curiam); *Wang v. United States,* 947 F.2d 1400 (9th Cir. 1991); *cf. Snodgrass v. Jones,* 957 F.2d 482 (7th Cir. 1992) (holding that no hearing required prior to district court's determination under (d)(3) where not explicitly required by statute, and no facts were in dispute). The Court having now ruled in *Lamagno* that judicial review is available under (d)(2) as well as (d)(3), it would be even less logical to allow the district court to resolve factual disputes only when reviewing the Attorney General's refusal to certify that an employee was not "within the scope" of federal employment, and not when the Attorney General has certified that the employee was "within the scope." In each situation the district court will finally decide the question of the employee's immunity, and it should resolve any factual disputes before doing so. Nothing in either provision of the statute commands otherwise.

F. The analogous federal officer removal statute does not require the defendant to admit the plaintiff's allegations to secure removal.

By analogy, under the federal officer removal statute, 28 U.S.C. § 1442(a)(1) (App. C hereto), the federal officer need not admit the plaintiff's allegations to secure removal. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969) (citation omitted). Rather, in this civil suit alleging assault by prison officials, the "color of office" test of § 1442(a) was met when the federal officer merely showed that his relationship to the plaintiff derived solely from his official duties. *Id.* at 409. The Court further explained:

> Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish.

Id. at 409 (citations omitted) (alterations in original).

Citing *Willingham,* a district court has held that a United States Navy superintendent was acting under color of his office in contacting a private employer concerning the prospective employment of a Navy civilian employee, and accordingly that a claim against him for tortious interference with contract was properly removed to federal court under § 1442(a)(1). *Areskog v. United States,* 396 F. Supp. 834 (D. Conn. 1975).

The "scope of employment" analysis under § 2679(d) is analogous to the "color of office" inquiry under § 1442(a). *See* 14C Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure* § 3727 (3d ed. 1998). Here, like in *Areskog*, Petitioner's own filings – including her pleading that Haley was employed as Business Manager for the Forest Service "at all times relevant" to her complaint – effectively established that her relationship with Haley derived solely from his official duties. Her mere conclusory allegation that he nonetheless acted for his own purposes in affecting her employment should not be enough to deny Haley the opportunity to present his own version of the facts to a federal court, before it finally decides whether he is entitled to immunity.

G. Under the Civil Rules, federal defendants are entitled to simultaneously deny the plaintiff's allegations and challenge their characterization as beyond the scope of employment.

As illustrated in Mr. Haley's case, the exception Petitioner seeks would also deny falsely-accused federal employees the opportunity to contest "incident-characterizing" facts or allegations. That is, it would deny employees the opportunity to make the legal argument that a complaint

describes conduct that may fall within the scope of employment as a matter of law, depending on the ultimate facts showing the context of the incident. Such a defense is no different than pleading hypothetically or in the alternative, which is specifically sanctioned in Fed. R. Civ. P. 8(e)(2). Even the holdings in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc) (Breyer, J.), and *McHugh v. Univ. of Vt.*, 966 F.2d 67, 74 (2d Cir. 1992), the sexual harassment cases upon which Petitioner primarily relies, carefully distinguished challenges to the context or characterization of the defendant's alleged conduct which go beyond simple denials:

> The context of the alleged act that is relevant to the scope of employment issue is a matter of fact to be determined by the district court, however, after an appropriate factual hearing. Whenever scope of employment is disputed, substitution should be made only if the court finds that the alleged acts were within the scope of employment.

McHugh, 966 F.2d at 74-75.

The *Wood* court, whose primary conclusion Respondents believe was flawed, conceded that "the certificate need not accept the plaintiff's version of just *how* it occurred." *Wood*, 995 F.2d at 1123. In response to the defendant's concern that "Driver A" who admits negligence would receive immunity while less culpable "Driver B," who denies that any accident occurred, would not, the *Wood* court explained that "it could be so only where Driver A can claim that the underlying incident is job-related, while Driver B cannot make this claim, even hypothetically for argument's sake." *Id.* at 1127. Addressing the concern that a plaintiff might transform a job-related tort into a non-job-related tort simply by alleging

an "off-duty" state of mind or alleging that a negligent action was carried out intentionally, the court stated:

> Rather, we insist that the certificate assume some kind of harm-causing incident, while leaving the Attorney General free to dispute characterization of the incident and subsidiary immunity-related facts. The Second Circuit held the same in *McHugh*. 966 F.2d at 74. Moreover, we previously held that the Attorney General's certificate may contest a plaintiff's incident-describing and incident-characterizing facts and that the court may resolve any such factual conflicts, relevant to immunity, prior to trial.

Id. at 1129.[4]

Remand of this case to the district court for an evidentiary hearing on the scope of employment issue is consistent even with *McHugh* and *Wood*. Unlike in those cases, the Petitioner has not alleged conduct – such as sexual assault or rape – which is clearly not entitled to the protection of immunity if it occurred and would clearly be beyond the scope of employment under state law under any version of events. Instead, Osborn alleged torts that the district court correctly ruled are not actionable if undertaken with a "purpose to serve the employer." (D. Ct.

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[4] By way of illustration, the *Wood* court noted that in its earlier case, *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990), the plaintiff had alleged that a federal employee intentionally injured him by driving fast in order to jostle him and throw him from side-to-side in the back of a truck. The court explained: "We assumed that these factual allegations, if true, would have placed Scannell's actions outside the 'scope of his employment' . . . but, we held the immunity certificate valid, pending a pre-trial evidentiary hearing that would resolve the key immunity-related factual dispute, namely whether Scannell intended to harm Nasuti." *Wood*, 995 F.2d at 1129 (citing *Nasuti*, 906 F.2d at 808).

Mem. & Order, App. D to Pet. Cert. 23a (citing *Am. Gen. Life & Accid. Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003)).) *See also Areskog v. United States*, 396 F. Supp. 834, 839-840 (D. Conn. 1975) (holding the naval superintendent immune as "within the outer perimeter of [his] line of duty" under *Barr v. Matteo,* 360 U.S. 564, 575 (1959) (plurality opinion), even though he committed the acts plaintiff characterized as tortious interference). Even criminal assault has been deemed within the scope of employment under Kentucky law, when intended to further the employer's purpose. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005).

Further, the United States articulated motives that could have justified Haley's alleged attempt to influence Osborn's employment as serving his employer. Osborn herself put forth documentation that she was fired because she engaged in public ridicule of a Forest Service official as a contractor's employee, pointedly undermining that official's (Haley's) attempt to address the quality of communications between the two organizations. This is hardly analogous to a case in which the only matter in dispute is whether the defendant committed a rape or sexual assault.

The instant matter also does not involve a situation in which the United States has merely denied the factual "allegations." Instead, the United States attempted to put the Petitioner to her proof, and then argued that even if Petitioner's allegations that Haley interfered with her employment were hypothetically true, Haley was entitled to a hearing to determine his intent or motive. Consistent with *Wood* and *Nasuti*, Haley should have been given the opportunity to contest Osborn's "incident-describing" and "incident-characterizing" allegations, which were merely

conclusory and did not even allege specific conduct. Paraphrasing the language of *Wood*, 995 F.2d at 1129, the district court should have considered all facts and arguments relevant to the context of Haley's alleged conduct, which could have been consistent with a legitimate business purpose.

Indeed, Petitioner effectively conceded that her claims against Haley describe conduct which can fall within the scope of employment under Kentucky law. Petitioner's claims against Respondent Verdi were essentially identical to those against Haley: she accused Verdi of discharging her in violation of public policy, conspiring to wrongfully discharge her, conspiring to interfere with her employment relationship, and committing outrageous conduct, all alleged to have been carried out in a "malicious, oppressive, and intentional manner in order to injure and damage plaintiff." (Compl., App. A to Verdi's Br. in Opp'n 1-15.) In each instance, Osborn specifically alleged that Verdi acted within the scope of her employment as Executive Director of the defendant LBLA while performing these acts. (*Id.* ¶¶ 24, 26, 37, 38, 44, 45, 52, 53 and 61, App. A 6-7, 9-11, 13-14.) Yet Petitioner in her later court filings characterized the same purported conduct as beyond the scope of Haley's employment. At the least, the Attorney General should be entitled to challenge Petitioner's self-serving re-characterization of these conclusory allegations.

II. Congress' Prohibition of Remand Following Certification is Consistent with Article III.

A. Congress clearly precluded remand by making the Attorney General's certification conclusive only for purposes of removal.

The Westfall Act provides that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court. 28 U.S.C. § 2679(d)(2). By making the certification conclusive only for removal, Congress clearly signaled its intent to preclude remand and provide a federal forum to federal employees in such cases, even when a district court finds the Attorney General's determination to be incorrect. Nine justices apparently recognized this in deciding *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). The majority reasoned that Congress likely omitted the Drivers Act provision authorizing remand, "because it had decided to foreclose needless shuttling of a case from one court to another – a decision evident also in the Westfall Act language making certification 'conclusiv[e] . . . for purposes of removal.'" *Id.* at 434 n.10. Assessing the same provision, the dissent stated: "The Court recognizes that there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system. . . . " *Id.* at 440 (Souter, J., dissenting). The four-circuit majority of appellate courts addressing the issue agreed, holding that the statute deprives the district court of authority to remand. *See* 6th Cir. Opinion, App. A to Pet. Cert. 10a, *available at Osborn v. Haley*, 422 F.3d 359, 365 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006); *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied,* 531

U.S. 1070 (2001); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996); *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993).

B. Congress did not violate Article III by prohibiting remand, since the Attorney General's certification raises the significant federal question of immunity from the outset.

The practical question before the Court, then, is whether Article III of the United States Constitution will allow the Court to give effect to Congress' plain language and intent. The split among the circuits on this question of remand is grounded squarely in Article III concerns. Petitioner cites *Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990), and *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995), for the proposition that a district court cannot retain jurisdiction after concluding that the defendant acted outside the scope of his employment. Both courts cited constitutional concerns (although *Nasuti* predates the published ruling in *Lamagno*). *See Haddon*, 68 F.3d at 1427; *Nasuti*, 906 F.2d at 814. Of the four circuits barring remand, only the Fifth Circuit in *Garcia v. United States* directly analyzed the Article III question, essentially adopting the *Lamagno* plurality's rationale in concluding that retaining jurisdiction after rejecting the Attorney General's certification was constitutional. *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996).

The plurality in *Lamagno* did not view the posed Article III problem as a grave one, reasoning (in paraphrase) as follows: (1) a case that raises a substantive question of federal law at the outset clearly "arises under" federal law within the meaning of Article III, *Lamagno*,

515 U.S. at 435 (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)); (2) the scope of a federal employee's employment is a significant federal question, and the Westfall Act was designed to assure that it could be aired in a federal forum, *id.*; and (3) considerations of judicial economy and convenience and fairness to litigants make it reasonable and proper to proceed beyond the federal question to final judgment, *id.* At this stage, the court will have invested time and resources on the initial scope-of-employment question, during which it "inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee." *Id.* (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). As the constitutional question is now squarely before the Court, *see id.* at 437 (O'Connor, J., concurring), the Court should now affirm this portion of the *Lamagno* opinion.

Respondents acknowledge the *Lamagno* dissenters' concern that to use the inevitable intermingling of evidence bearing on both scope of employment and liability to justify retaining jurisdiction is "tantamount to saying the authority to determine whether a court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge." *Id.* at 442 (Souter, J., dissenting). But this view incorrectly characterizes the determination the district court must make. The district courts have no "authority to determine . . . jurisdiction" following the Attorney General's certification. Congress conclusively prohibited them from doing so, via § 2679(d)(2). *See infra* Parts III(B)(1) and (2). Rather, the judicial review recognized by *Lamagno* entails determining whether to override the Attorney General's conclusion, speaking as the federal employer, that its employee was acting within the scope of

his employment. This is the question that becomes "intermingled" with the merits of the underlying claims, and it is a question of federal immunity, not jurisdiction. The involvement of this federal question from the outset does indeed justify Congress' decision to leave jurisdiction with the district court following its resolution. As the *Lamagno* plurality noted, if the plaintiff necessarily relies on federally-created legal relationships, her claim should be treated as one arising under federal law within the meaning of Article III. *Lamagno*, 515 U.S. at 436 (citation omitted). Since Congress further "federalized" the question by involving the United States Attorney General in the scope of employment determination, the matter falls within Congress' unquestioned Article III power to create federal questions by statute, thereby creating federal jurisdiction.

Even the Petitioner agrees that the majority interpretation of § 2679(d)(2) as prohibiting remand is "eminently reasonable" with respect to certifications that are "authorized by the Westfall Act," as this "gives effect to the adverb *conclusively*, and it 'foreclose[s] needless shuttling of a case from one court to another.'" (Petr.'s Br. 38 citing *Lamagno*, 515 U.S. at 433 n.10.) Perhaps this is why Petitioner never requested remand before the court ordered it, asking the court instead to lift the stay on discovery so that the case could move forward against Haley in federal court. (Tendered Order attached to Pl.'s Resp., R. 15.)

C. Questions of law and fact relevant to Haley's immunity created federal jurisdiction over this case from the outset.

Nonetheless, Petitioner now attempts to contrast the present case as involving an "unauthorized" certification

and removal. Thus, Petitioner argues, there was never any dispute for the district court to resolve other than whether the alleged incident did in fact occur, and accordingly, the court never had federal subject matter jurisdiction and was required to remand under 28 U.S.C. § 1447(c) (App. C hereto). As demonstrated above, this is simply not correct. First, there is no such thing as an "unauthorized" certification under the statute. Second, as demonstrated in the Statement of the Case, questions of law were intertwined with the facts relating to the scope of Respondent Haley's employment.

Even if Petitioner were correct, then in deciding solely a factual dispute, the district court would still be deciding whether the incident occurred for the very purpose of determining whether the federal employee acted within the scope of his federal employment. This decides the distinctly federal question of immunity. Again, since scope of employment "sets the line" according to *Lamagno,* 515 U.S. at 423, the key question is not whether the defendant or the Attorney General denied the plaintiff's allegations; it is whether Barry Haley acted within the scope of his employment, and is therefore entitled to immunity. This is a uniquely federal question. Accordingly, the basis for federal jurisdiction was present since the Attorney General's certification, if not from the very moment the allegations were filed. To conclude otherwise would be to accept the unworkable premise that falsely-accused employees are simply not entitled to immunity.

D. Federal jurisdiction was also present from the outset under the federal officer removal statute.

Additionally, the United States preserved a separate basis for federal jurisdiction by requesting removal to federal court under the federal officer removal statute, 28 U.S.C. § 1442 (App. C hereto), as well as the Westfall Act. (Notice of Removal 1-3, R. 1.) As explained in detail above, this Court has already determined that a federal officer need not admit the plaintiff's allegations to secure removal. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969) (citing *Maryland v. Soper*, 270 U.S. 9, 32-33 (1926)). Further, the "color of office" test of § 1442(a) and *Willingham's* required "causal connection" of the allegations to the defendant's official duties are easily met here, where Petitioner's own filings effectively established that her relationship with Haley derived solely from his official duties.

III. The Court of Appeals Had Jurisdiction to Review the District Court's Decisions.

A. The court of appeals enjoyed jurisdiction to review the order of resubstitution under the doctrines established by this Court in *Cohen* and *Waco*.

1. The district court's resubstitution order is reviewable under the collateral order doctrine announced in *Cohen*, as a ruling denying governmental immunity.

Appellate jurisdiction typically arises from a "final and appealable order" of a district court; i.e., appellate review is barred until the trial court finally adjudicates all of the issues presented to it by the litigants. *See* 28 U.S.C.

§ 1291; *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). An exception to this rule exists, however, for those orders that "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. ___, 126 S. Ct. 952, 958 (2006) (citations omitted). While the Court has stated that these conditions must be applied in a "stringent" manner to avoid upsetting the finality requirement contained in § 1291, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), certain classes of orders, by their very nature, automatically fall within this so-called "collateral order doctrine."

Among these are orders denying governmental employees the benefits of absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), and qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The purpose of the congressionally-established substitution process, as set forth above, is to afford certain federal employees the benefits of governmental immunity. The order entered by the district court overturning the substitution decision of the Attorney General under 28 U.S.C. § 2679(d)(2) and resubstituting Respondent Haley as a party defendant in his individual capacity effectively denied Respondent Haley the protection of governmental immunity under the Federal Tort Claims Act. The resubstitution order of the district court, therefore, falls within the category of cases where immediate, interlocutory appellate review is available under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[5]

[5] The courts of appeal unanimously agree that a government employee has a right of immediate appeal from an order of resubstitution under the Westfall Act. *See Woodruff v. Covington*, 389 F.3d 1117,

(Continued on following page)

2. *Will v. Hallock* permits review of the re-substitution order, as a ruling denying governmental immunity.

The recent opinion of this Court in *Will v. Hallock*, 546 U.S. ___, 126 S. Ct. 952 (2006), does not alter the established rubric for immediate appellate review of orders denying governmental immunity. In *Will*, the respondent first brought suit against the United States under the FTCA, alleging negligence by government agents in the search of her home. *See Will*, 126 S. Ct. at 956. The district court dismissed the action, finding it barred under an exception in the FTCA. *Id.* The respondent, during the pendency of the FTCA action, brought a second claim against the officers pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), asserting the agents' conduct violated her rights of due process secured by the Fifth Amendment. Asserting the judgment bar of the FTCA, *see* 28 U.S.C. § 2676, the agents sought dismissal of the *Bivens* claim once the district court entered its order on the initial FTCA claim. *Will*, 126 S. Ct. at 956. The district court denied this request, and the Government appealed. *Id.*

1123-24 (10th Cir. 2004) (citing *Mathis v. Henderson*, 243 F.3d 446, 448 (8th Cir. 2001); *Cuoco v. Moritsugu*, 222 F.3d 99, 105-06 (2d Cir. 2000); *Lyons v. Brown*, 158 F.3d 605, 607 (1st Cir. 1998); *Rodriguez v. Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Melo v. Hafer*, 13 F.3d 736, 741 (3d Cir. 1994); *Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 870 (9th Cir. 1992)) (finding that a resubstitution order falls within the *Cohen* doctrine and that "every circuit court follows" the collateral order doctrine in reviewing such orders).

While the Second Circuit affirmed the court below, this Court ordered reversal for want of jurisdiction in the court of appeals. Finding that the FTCA bar more accurately equated to the common law doctrine of res judicata or claims preclusion than to a denial of governmental immunity, the Court determined that rejection of the FTCA claim bar did not rise to the level of a collateral order under *Cohen*. *See Will*, 126 S. Ct. at 960.

The explanation offered by the Court in *Will* to support this conclusion demonstrates the inapplicability of its holding to the case at bar. The protections for government employees that Congress established in the Westfall Act do not constitute the "avoidance of litigation for its own sake," but rather demonstrate an unequivocal judgment by the legislative branch that employees of the federal government are entitled to absolute immunity for actions performed in the scope of their employment. *Id.* This immunity protection is not "procedural in nature"; rather, it is "timely from the moment" of the certification by the Attorney General. *Id.* It depends not on some prior action involving the same facts and circumstances – indeed, it is not qualified on any precondition at all, as the immunity protection is absolute and immediate. *See Lamagno*, 515 U.S. at 423; *cf. Will*, 126 S. Ct. at 960 (noting that application of the judgment bar is dependent upon the bringing of a prior action under the FTCA and a finding in favor of the Government in the earlier action). The question is not one of procedure, but one of immunity.

Like the purpose of qualified immunity is to encourage governmental employees to act without fear of constitutional liability when an issue of law is unclear, the purpose of the Westfall Act is to encourage governmental employees to carry out their duties without fear of common law tort

liability. *Will*, 126 S. Ct. at 960. In the preamble to the Westfall Act, Congress set forth its express desire to accomplish just this task, stating that "the purpose of this Act [is] to protect Federal employees from personal liability for common law torts committed within the scope of their employment. . . ." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(b) (1988). Quick resolution of the substitution question is therefore "essential" to further the policy which undergirds the immunity scheme established by the Act. *Will*, 126 S. Ct. at 960.[6]

3. The order of resubstitution was reviewable as a separate, precedent order under *Waco*.

Although Respondents contend, *infra*, that the express language of the Act afforded the court of appeals jurisdiction to review both the order of remand and the order of resubstitution, jurisdiction to review the latter also arose from the decision of this Court in *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140 (1934). *Waco* arose from a district court's decision dismissing a party's cross-claim and, then determining that the dismissal destroyed

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[6] One can argue, as the Government did in *Will*, that application of the FTCA judgment bar is similarly "essential" to further the immunity policies of that statute. However, such an argument improperly juxtaposes the questions of immunity and judgment. The issue of substitution goes to the heart of the question of immunity: if substitution is proper the employee is immune; if not, there is no immunity. The question of the judgment bar, by contrast, goes to the ultimate question of the effect of a judgment, which can only arise after the question of immunity has been finally answered. Once a judgment has been entered, the congressional policy of affording immunity has already been served, or one would not be discussing an FTCA judgment at all.

the court's diversity jurisdiction, entering an order remanding the action to Texas state court. *See id.* at 141-42. This Court found appellate jurisdiction to review the dismissal of the cross-claim, notwithstanding the bar of the then in effect version of 28 U.S.C. § 1447, on grounds that the "decree of dismissal preceded that of remand" and would be conclusive on the parties upon their return to state court. *Id.* at 143. The Court "disaggregated" the two orders and proceeded to direct review of the initial dismissal. *See Kircher v. Putnam Funds Trust*, 547 U.S. ___, 126 S. Ct. 2145, 2156 n.13 (2006).

Similar reasoning applies to the current claim. The issue of resubstitution is "separate from and logically precedes the question of remand" and can be reviewed without effect upon the remand order.[7] *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (Alito, J.) (citations omitted), *cert. denied*, 510 U.S. 817 (1993). The remand discussion contained in the district court opinion reveals that the decision to order remand was contingent upon a prior finding of resubstitution. (*See* D. Ct. Mem. & Order, App. D to Pet. Cert. 24a ("Having concluded that the United States is not a proper party to this case, this Court must now determine [the question of remand]".).) This decision thus fits squarely within the *Waco* rationale, and jurisdiction for review of the resubstitution order is available pursuant to the procedure contained in that opinion.[8]

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[7] Assuming, of course, that the district court possessed the necessary statutory authority to order the remand. *Cf. infra* Part III(B).

[8] Similarly to the application of the collateral order doctrine, the courts of appeal agree that *Waco* permits review of the resubstitution order. *See Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 389-90 (11th Cir. 1996); *Hanna v.*

(Continued on following page)

4. *Kircher* permits review of the resubstitution order under *Waco*, because the order did not resolve the entire action.

In the *Kircher* opinion, the Court addressed an argument by the respondent mutual funds that review was available for the decision in that matter pursuant to *Waco*. The Court, in addressing this argument, noted "[w]ithout passing on the continued vitality of that case [*Waco*] in light of § 1447(d), we note that on its own terms it is distinguishable." *Kircher*, 547 U.S. ___, 126 S. Ct. at 2156 n.13. The Court concluded that, because the "remand order here cannot be disaggregated as the *Waco* orders could," the *Waco* rule did not permit review. *Id.*

First, nothing contained in the current version of 28 U.S.C. § 1447(d) undermines the rule set forth in *Waco*. The version of the remand review statute in effect at that time, 28 U.S.C. §§ 71 and 80, contained a materially-identical bar to reviewing remand orders. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 349-50 (1976) ("Sections 1447(c) and (d) represent the . . . recodification of §§ 71 and 80. They were intended to restate the prior law with respect to remand orders and their reviewability."). As this Court explained in *Thermtron*, "[n]o changes of law or policy are to be presumed from changes to the language in the 1948 revision of the Judicial Code unless an intent to make such changes is clearly expressed." *Id.*

Naegele, 72 F.3d 137 (unpublished table opinion), 1995 WL 723597 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Jamison v. Wiley*, 14 F.3d 222, 233 (4th Cir. 1994); *Aliota v. Graham*, 984 F.2d 1350 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990).

at 350 n.15 (citation omitted). Because the text of the current version of § 1447(d) contains no "clear expression" of a change in law from the remand review statutes in effect at the time of *Waco*, the rubric set forth in that opinion remains unaltered in evaluating review of the resubstitution order in the case at bar.

Second, *Waco*, unlike *Kircher*, is not distinguishable here on its facts. The discussion in *Kircher* arose out of the peculiar statutory mechanism contained in the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 77p. The SLUSA statute provides not for a mechanism of continued adjudication, but one of dismissal; i.e, if the preclusion provision contained in the statute applies, the case is automatically dismissed in its entirety. *See Kircher*, 126 S. Ct. at 2155 ("If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss."). Here, upon resubstitution of Respondent Haley as a party defendant, there was something to return to state court – a bevy of state law employment-related torts against the Respondents. *See Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir. 1990) (noting that by ordering resubstitution of the individual defendant, a case exists for return to state court).

Further, in the case at bar, regardless of the FTCA protection extended to Respondent Haley, the FTCA will not bar continued action against Respondent Verdi. A Kentucky state court judge could exercise his or her discretion afforded under Ky. R. Civ. P. 21 and sever the two claims, leaving an administrative action under the FTCA and a state court claim proceeding against Respondent Verdi. Unlike in *Kircher*, therefore, something did exist "to remand to state court" following entry of the resubstitution order. *Kircher*, 126 S. Ct. 2156 n.13.

B. Section 1447(d) presents no bar to review of the remand order.

1. Section 1447(d) bars review only of remand orders invoking grounds within the district court's authority to consider under Section 1447(c).

The statutory language contained in § 1447(d), while ostensibly absolute in its bar of appellate review, must be construed in light of the language contained in § 1447(c). *See Thermtron*, 423 U.S. at 345-46 ("These provisions, like their predecessors, are in pari materia and are to be construed accordingly rather than as distinct enactments." (quotation and citation omitted)). This Court thus held in *Thermtron* that "only remand orders issued under § 1447(c) and invoking the grounds specified therein that removal was improvident and without jurisdiction are immune from review under § 1447(d)." *Id.* at 346. Applying this rule, the Court concluded in *Thermtron* that the Sixth Circuit possessed appellate jurisdiction to review a remand decision based upon an overcrowded district court docket. The Court found that the provision contained in § 1447(d) did not insulate from review district court remands based on "grounds that seem justifiable to them but which are not recognized by the controlling statute." *Id.* at 351.

> That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the

> writ of mandamus [overturning the remand] was not barred by § 1447(d).

Id.[9]

2. Section 2679(d)(2) barred the District Court from directing remand in this action, and accordingly there were no grounds it had authority to consider under § 1447(c).

In the case at bar, as in *Thermtron*, the district court "exceeded his statutorily defined power" in ordering remand. *Thermtron*, 423 U.S. at 351. Section 2679(d)(2) expressly states that the certification by the Attorney General "shall conclusively establish the scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). While the district court enjoyed the ability to review the scope of employment question under *Lamagno*, "his statutorily defined power" did not grant to him the ability to order a remand.

> Congress, by expressly stating that the Attorney General's certification is "conclusive" as to jurisdiction, has prohibited a district court from using its disagreement with the Attorney General's scope of employment certification to deny jurisdiction and

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[9] The Court subsequently recognized another circumstance that fits within the *Thermtron* rule construing the statutory authority of district courts and its impact upon appellate review. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), the Court held that remand based upon application of the abstention doctrine established by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) was not a remand order described in § 1447(c), and therefore appellate review was available. *See Quackenbush*, 517 U.S. at 712.

> so send the case back to state court where it originated.

Aliota, 984 F.2d at 1357. The court could not legitimately invoke the grounds specified in § 1447(c), that "removal was improvident and without jurisdiction," when Congress had issued a blanket statement conclusively establishing removal jurisdiction.[10]

Thus, the question is not whether there was "plain . . . legal error in ordering the remand," for which appellate review is unavailable. *See Kircher*, 126 S. Ct. at 2154 (citations omitted). The question is whether the district court had authority to remand at all. Congress' express creation of non-discretionary, exclusive federal jurisdiction for matters under § 2679(d)(2) simply afforded the district

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[10] Revisions to § 1447(c) enacted by Congress subsequent to the decision in *Thermtron* do not alter its directive that actions taken by a district court without statutory authority are not immune from appellate review. Moreover, it is clear from a review of the legislative history to these revisions that Congress sought only to impose a thirty day time limit on filing motions to remand based upon defects other than a lack of subject matter jurisdiction, not to alter the existing understanding of appellate review of remand orders. *See* H.R. Rep. No. 104-799, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3417, 3418 ("The intent of this amendment was to impose a 30-day limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction."). The statutory history reveals the language that in 1976 (at the time of *Thermtron*) read "improvidently," became in 1988 "defect in removal procedure," and in 1996 became "any defect other than subject matter jurisdiction," is consistently designed to cover defects that occur at the time of removal other than subject matter jurisdiction. Here, no "defect" existed at the time of removal due to the statutory language contained in § 2679(d)(2), placing the district court's remand order outside those covered by § 1447(c) under any of its modern statutory phrasings.

court no statutory authority to order remand of this "properly removed" action. *Thermtron*, 423 U.S. at 351.[11]

Allowing district courts to override Congress' statutory directive with impunity would render the language of § 2679(d)(2) null and void. Enforcing this provision, by contrast, does no injury to § 1447, which merely protects the district courts' discretion to remand in cases in which removal jurisdiction is at issue. Subject to constitutional boundaries which are not reached here (*see* Part II(A), *supra*), Section 2679(d)(2) foreclosed any issue of removal jurisdiction or remand in Westfall Act cases in which the Attorney General has certified scope of employment. This is the "clear statutory command" the Court recognized as an exception to the presumption that Congress "is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal." *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (citations omitted). Unlike the bankruptcy removal/remand statute the Court analyzed in *Things Remembered* and the SLUSA removal provision addressed in *Kircher*, § 2679(d)(2) "cannot comfortably coexist" with § 1447 under the interpretation

[11] District courts, like all inferior federal courts, are creatures of statute, there being no express provision in the Constitution for the creation of such courts without congressional action. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. ___, 125 S. Ct. 2611, 2616-17 (2005) ("The district courts of the United States, as we have said many times, are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." (quotation and citation omitted)). Congress has the power to invest district courts with "jurisdiction, either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which Congress may deem proper for the public good." *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

Petitioner proposes. *Id.*; *see also Kircher*, 126 S. Ct. at 2153 n.8.

Contrary to Petitioner's argument, the district court lacked any authority to conclude it "had no original jurisdiction over this case," as Congress expressly provided for such jurisdiction. (Petr.'s Br. 12 (quoting *Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991)).) Indeed, in *Lamagno*, all nine members of the Court recognized that Congress intended the language in question to remove from the district court the authority to evaluate the propriety of removal, and thus, remand. *See supra* Part II(A).[12]

No constitutional prohibitions exist to prevent the exercise of the clear statutory language set forth by Congress, and the lack of authority for the district court's action in this situation is clear. Therefore, the remand order did not fall within the ambit of § 1447(c), and was properly subject to review by the court of appeals and now this Court.

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[12] Denying effect to the "conclusively . . . for removal" wording of the statute would threaten the very analytical foundation of *Lamagno*: if the majority had not interpreted the phrase to preclude remand, then its discussion of potential Article III problems would have been moot, along with the dissent. The alternative interpretation, that the Attorney General's certification is conclusive for all purposes, would preclude judicial review of the certification. Had *Lamagno* so held, then the U.S. Attorney's certification that Haley acted within the scope of his employment would control, and the case would remain in district court with the United States as a party. Under either interpretation, Haley would be entitled to defend the action in a federal forum. If the word "conclusively" is given any effect in the statute, the question of remand should never arise.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A. § 2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

> **(A)** which is brought for a violation of the Constitution of the United States, or
>
> **(B)** which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of

the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States

shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a

claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

> **(A)** the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> **(B)** the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

APPENDIX B

28 U.S.C.A. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX C

28 U.S.C.A. § 1442

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> **(3)** Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;
>
> **(4)** Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the

district court of the United States for the district and division in which the defendant was served with process.

APPENDIX D

28 C.F.R. § 15.3 Agency report.

(a) The Federal employee's employing Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the employing Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(b) The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the appropriate Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(c) A report under this section shall be submitted at the earliest possible date, or within such time as shall be fixed upon request by the United States Attorney or the responsible Branch Director of the Torts Branch.

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28 C.F.R. § 15.4 Removal and defense of suits.

(a) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the

Federal employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose.

(b) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy.

(c) A certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or refusal to remove or defend, such civil actions or proceedings shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division or his or her designee.